

(2023) 07 CAL CK 0063
In the Calcutta High Court
Case No : W.P.A. No. 15088 Of 2023

M/S. Dhansar Engineering Co. Pvt. Ltd. & Anr.	APPELLANT
Vs	
West Bengal Mineral Development & Trading Corporation Ltd. & Ors.	RESPONDENT

Date of Decision : 14-07-2023

Acts Referred:

Citation : (2023) 07 CAL CK 0063

Hon'ble Judges : Sabyasachi Bhattacharyya, J

Bench : Single Bench

Advocate : Ranjan Bachawat, Dwaipayan Basu, Amrita Panda, Arkaprava Sen, Kishore Datta, Sanjay Saha, Subhasish Bhattacharyya, Piyush Agarwal, Utsha Dasgupta, Shrivalli Kajaria

Final Decision : Dismissed

Judgement

Sabyasachi Bhattacharyya, J

1. The petitioners have challenged an order of debarment/blacklisting of the petitioners for a period of five years in respect of transactions with the respondent-Authorities. Learned senior counsel for the petitioners argues that the impugned blacklisting tantamounts to a civil death of the Company. If the company remains debarred from participating in the tender floated by the respondents, which are Government authorities, the petitioner-Company will suffer a stigma and will be precluded from other similar tenders floated by other authorities as well, because it is an usual clause in all such tenders that a participant cannot offer a bid if blacklisted previously.

2. It is submitted that, although a hearing was given to the petitioner, the order of blacklisting was passed mechanically without assigning any reason in terms of Clause 9.7.1 of the Tender Document as well as in contravention of principles of natural justice.

3. It is further submitted that since the provision of blacklisting is a punitive one,

the same should be interpreted strictly.

4. It is admitted by the petitioners that the petitioners have previously suffered sudden set-backs, including one previous tender being recalled, another resulting in forfeiture of the petitioners' earnest money and the non-participation of the petitioner after initiation in a third tender; but, none of those are germane in terms of the present tender.

5. However, admittedly, the petitioner no. 1-company had previously entered a joint venture with a third party and the said joint venture was blacklisted for a term of five years in an earlier tender.

6. The petitioner has participated in the present tender by forming a joint venture with a different company, which had no nexus with the said earlier tender.

7. In terms of the conditions of the present tender, the bidder was to disclose that none of the contracts of the bidder or any member of the bidding group or the bidding consortium have been terminated or foreclosed due to their default.

8. Scrutinizing the said provision, that is 7.8.3(a) of the Notice Inviting Tender (NIT) closely, the joint venture, which is comprised of the petitioner and a third party in the present tender process, was never terminated or foreclosed previously. The joint venture which was foreclosed, being comprised of the petitioner no.1 and an entirely different company, was a separate entity altogether from either the petitioner individually or the present joint venture, of which the petitioner is a component.

9. Thus, it is argued that there is no applicability of Clause 9.7.1(c) of the Techno Commercial Proposal attached with the NIT, which provides that the bid security shall be forfeited and appropriated by the respondent-authorities if any of the documents submitted by a bidder as a part of the bid is found to be not genuine or forged or any of the claims, confirmations, statements or declarations of the bidder is found to be incorrect or inconsistent, including the declaration given under Clause 7.8.3 or in case of any material misrepresentation of facts at any point of time during the bid evaluation process as, in the present case, there is no false statement or incorrect statement or claim made in the bid document in terms of Clause 7.8.3 or its sub-clauses.

10. Learned senior counsel for the petitioner cites Aquafil Polymers Co. Pvt. Ltd. Vs. Gujarat Urban Development Company Limited, reported at MANU/GJ/1979/2022, where it was observed that the conditions in the tender document which could be said to be penal in nature have to be construed and applied strictly. In the said case, a Division Bench of the Gujarat High Court had observed that when the tender bid contains eligibility criteria, the corresponding obligation to satisfy the criteria arises. However, where the tender document does not provide specifically about certain disclosure, the authorities cannot scrutinize the tender document for what is not provided for. The word "bidder" in

relation to, and as applied to, in the said tender document was held to mean the individual petitioner itself as tenderer. The Division Bench observed that, strictly speaking, the petitioner was not the tenderer in the concerned project and it could not be said that it was the petitioner-entity which was debarred and blacklisted there. That Court observed that when the information of the instant tender was to be furnished, the non-mention on the part of the bidder about the joint venture bidder in Rajasthan having been stated as debarred could not be fatal.

11. The Gujarat Division Bench also held that the appellant before the court in *M/s. Gammon India Limited Vs. Commissioner of Customs, Mumbai* [(2011) 12 SCC 499], a joint venture, could be treated as a legal entity with the characteristics of a partnership. The Gujarat High Court held that the suppression of pending litigation could not be a ground for disqualifying the appellant in the said case on the principle as laid down above, since a joint venture is an independent legal entity.

12. It is, thus, argued that the blacklisting of the petitioner was palpably without authority and in violation of law and it should be set aside.

13. Learned senior counsel appearing for the respondents relies on a notice of debarment dated June 16, 2017 issued by the Western Coal Fields Limited to a joint venture which was comprised of the petitioner and a different company. It is submitted that in the said order of debarment, it was clearly mentioned that the joint venture, jointly and severally, along with the Directors/partners of both the companies, individually, jointly and severally, were debarred from participation in future tenders of the said authority for twelve months.

14. In the present case, the said incident was relevant within the contemplation of Clause 7.8.3 of the NIT but was suppressed by the petitioner in its bid document, for which forfeiture was effected.

15. Hence, the blacklisting following the same was fully justified.

16. It is argued that false information was given by the present joint venture/bidder, in the bid document, suppressing the said germane incident of blacklisting of one of its members, contrary to the provisions of the NIT.

17. The present impugned blacklisting was effected after duly giving a show-cause notice and hearing the petitioner at length and by giving appropriate reasons. It is, thus, submitted that the blacklisting was not vitiated in any manner.

18. That apart, learned senior counsel for the respondents argues that the impugned decision of blacklisting, in any event, was one of the plausible views in the context; as such, there ought not to be any interference with such due exercise of discretion by the respondent-authorities by the writ court.

19. Learned senior counsel also seeks to distinguish the cited judgment on

factual score.

20. Heard learned counsel for the parties.

21. One of the contentions urged by the petitioner is that the condition regarding disclosure of previous blacklisting was not an essential condition of the tender document and, as such, exempted within the purview of Aquafil Polymers (supra). It is submitted that, as opposed to the "Qualification Requirements" stipulated in the tender document, the provision as to disclosure of prior termination or foreclosure was stipulated under "Other Terms and Conditions". More importantly, it has been argued that the absence of genuineness or inconsistency or incorrectness of the documents leading to forfeiture was stipulated in Item 9 of the tender document, which pertains to contents of Techno-Commercial Proposal, and are not a part of the essential criteria or qualification requirements. Hence, the blacklisting for alleged contravention of such non-essential condition of the tender is bad.

22. However, such argument is not supported by the judgments cited by the petitioners.

23. The relevant paragraph of Aquafil Polymers (supra), in the context, is paragraph 5.6 thereof. We find from paragraph 5.1 that there were several limbs of conditions for blacklisting.

24. One of the limbs was that the bidder shall be disqualified if it had made misleading or false misrepresentation in the forms, statements and attachments submitted as proof of "Qualification Requirements".

25. The other limb was that the bidder should provide accurate information on litigation and/or arbitration resulting from contract completed or under execution by him over the last five years. A consistent history of arbitration awards/judgments against the applicant or any partner of a joint venture, it was stipulated, may result in disqualification for proposed work. If the details of litigation history are hidden by the applicant and later on come to the knowledge of the employer, the bidder shall be disqualified for the proposed work and other appropriate action shall be taken against the bidder, as per the relevant clause therein. In such perspective, the Gujarat High Court went on to decide on the first limb and observed that a joint venture is a different entity and as such, the non-mention of previous blacklisting of the joint venture could not be germane as suppression.

26. Paragraph 5.6 of the report, however, dealt with the second limb of the relevant clause in the said case, which contained the ground of suppression of pending litigation, which was held by the Gujarat High Court to be without substance. That apart, there was an arbitration proceeding between the joint venture, which was awarded the contract, and the Rajasthan Infrastructure Project, which culminated in an arbitral award in favour of the said bidder. Even otherwise, the aspect about alleged non-disclosure of those details by

themselves could not be said to be any violation of an essential condition of the tender document. Such conclusions in the cited judgment followed from the initial observation in paragraph 5.1 thereof.

27. In the said case, misleading and false information as to previous blacklisting was a condition of blacklisting in the relevant contract, but insofar as the details of litigation were concerned, the same were comprised of a different provision altogether. On such aspect, the Gujarat High Court held that improper disclosure or non-disclosure of litigation details was not an essential condition of the tender document. Moreover, the outcome of the litigation in the said case went in favour of the joint venture, as such, was not a factor which went against the bidder.

28. However, as opposed to such distinguishing circumstances, in the present case, the relevant condition that is Clause 7.8.3 was a part of Item 7.8 (Other Terms and Conditions), which Item was a sub-item of Clause 7 of the NIT, pertaining to "Qualification Requirement". Hence, the disclosure as contemplated in Clause 7.8.3(a) of the tender document in the present case fell within the qualification requirements and, thus, was definitely an essential requirement of the tender.

29. That apart, there are other distinctions between the Aquafil Polymers (supra) and the present case. In Aquafil Polymers (supra), the previous blacklisting pertained only to the joint venture, which was treated to be a separate entity. However, even the treatment as a separate entity, it is relevant to mention, was dealt with in details, in Aquafil Polymers (supra). A close scrutiny would reveal that although a joint venture can be taken, under certain circumstances, as a separate juristic entity, the same is in the nature of a partnership, as observed in Aquafil Polymers (supra) itself. It is important to note that a partnership casts joint and several liabilities on all the partners.

30. Much more importantly, in the present case, the notice of debarment dated June 16, 2017 issued by the Western Coal Fields Limited in a previous tender entered into by the petitioner, as a component of a joint venture with a third company, clearly discloses as follows:

"iii) You i.e. M/s DBL-DECO (JV), jointly & severally along with their directors/partners of M/s Dilip Buildcon Limited, Bhopal and M/s Dhansar Engineering Company (Private) LTD are individually, jointly & severally debarred from participation in future tenders of WCL for a period of 12 (Twelve) Months."

31. Hence, it was not merely the joint venture, as an individual entity, which was blacklisted but both the members of the said joint venture, including the petitioner no.1 herein, jointly and severally, along with their directors/partners. In fact, the petitioner no.1 and its other partners in the joint venture were separately mentioned and were "individually, jointly and severally" debarred for twelve months in the said tender. Hence, the said act was absolutely germane and fell squarely within the contemplation of Clause 7.8.3 which was one of the qualification requirements in the case at hand. Clause 7.8.3(a) stipulated that,

for being eligible to participate, none of the contracts of the bidder or any member of the bidding group or the bidding consortium could have been terminated or foreclosed due to their default.

32. Clause 9.7.1 requires an affidavit by the bidder, including each member of the bidding group or the bidding consortium to the effect that none of their contracts have terminated or foreclosed due to their default. The bidder, including each member of the bidding group or the bidding consortium, as per Clause 9.7.1, additionally, have also to declare that if it is found at any point of time that their documents are not genuine or are false or forged, then the tender will be rejected, earnest money deposited and forfeited and the participants will be debarred from participating in further/future tenders of the respondent-Authorities. As per sub-clause (d) of the said Clause, the decision in that regard taken by the respondent-Authorities, based on verification, would be final and binding on the bidder.

33. Although a doubt has been sought to be cast by the petitioner on the issue as to whether the documents being "not genuine or false or forged" covers the present incidents of incorrect statement.

34. However, three separate expressions have been used in the relevant Clause, that is, sub-clause (c) of Clause 9.7.1, being "not genuine", "false" and "forged".

35. As opposed to "not genuine" and "forged", the expression "false" specifically pertains to the averments or declarations or statements made in the said affidavits or declarations. Whereas forgery or genuineness can be characteristics of the process of documentation, falsity, as opposed to the said two expressions, and used in addition and independently to such expression, can only relate to the statements made in the documents.

36. Hence, such line of argument of the petitioner cannot also be accepted. A false statement which goes to the root of the tender, inasmuch as it hits the essential qualification requirements thereof, was rightly not pardoned by the respondent-Authorities in the present case. The respondents are, in any event, justified in arguing that they had a reasonable discretion and the authority to decide on the outcome of the verification regarding the genuineness or falsity of the declarations. However, in the present case, such discretion is not required to be gone into at all, since the suppression of the petitioners ex facie shows that the petitioner was rightly blacklisted.

37. The unreported judgments of the Nagpur Bench of the Bombay High Court cited by the respondents is not germane in the present case, since in paragraph no.20 thereof, it was laid down that principle of justice are to be followed before passing an order of blacklisting.

However, in the present case, it is nobody's case that the petitioner was not given a hearing or a show-cause prior to the debarment for five years.

38. A bare perusal at the impugned decision of debarment shows that elaborate

reasons were given therein and the respondent-Authorities have even referred to all the relevant Clauses of the tender document and the exact nature of suppression by the petitioner.

39. Hence, no fault can be found with such exercise of discretion by the respondent-Authorities.

40. In such view of the matter, WPA No.15088 of 2023 is dismissed on contest without any order as to costs.

41. Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.